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328-161—68——1

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 725

RAYMOND PATRIARCA, RONALD J. C[illegible]SESSO, AND HENRY TAMELEO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1968. The petition for a writ of certiorari was filed on November 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a remark made by the prosecutor in closing argument constituted reversible error.

2. Whether the trial court properly denied a motion for a change of venue and continuance based on alleged prejudicial publicity.

STATEMENT

After a jury trial, all three petitioners were convicted in the United States District Court for the District of Massachusetts of conspiring to travel and to cause others to travel in interstate commerce with intent to commit murder in order to promote an unlawful enterprise in violation of 18 U.S.C. 1952(a) (2) and (3). In addition, petitioner Patriarca was convicted on a substantive count charging a violation of 18 U.S.C. 1952(a)(2), and petitioner Tameleo on two substantive counts. On March 25, 1968, Patriarca was sentenced to imprisonment for five years and fined $10,000 on the conspiracy count, and to five years on the substantive count, the terms to run concurrently. Tameleo was sentenced to imprisonment for five years and fined $10,000 on the conspiracy count, and to five years on each of the substantive counts, all terms to run concurrently. Cassesso was sentenced to imprisonment for five years and fined $10,000 on the conspiracy count. The court of appeals affirmed the convictions (Pet. App. A).

1. The government's evidence (the sufficiency of which is not challenged as to the conspiracy count) was supplied in most part by the testimony of an unindicted co-conspirator, Joseph Baron. That evidence showed that in March 1965, Tameleo told Baron that he (Tameleo) and Patriarca were having trouble with one Willie Marfeo who was operating a dice game on Federal Hill (Providence, Rhode Island) contrary to

Patriarca's orders. Tameleo told Baron that he had told Marfeo to close the game because his activities were drawing "police heat" to the Federal Hill area, but that Marfeo had not complied (II. 130–132).[1] According to Tameleo, the police had earlier approached Patriarca and had asked him to use his influence in closing the game. Patriarca himself attempted to restrain Marfeo, but to no avail (II. 132, 133).

On a Monday in late June or early July, 1965, Tameleo asked Baron and Cassesso to travel from Boston to Patriarca's office in the Federal Hill area of Providence, Rhode Island, to help them "solve a problem" (II. 141–142). Baron telephoned Cassesso and told him of Tameleo's request (II. 144–147). The following morning, Cassesso picked up Baron and drove to Patriarca's office (II. 147–150, 156). Patriarca, Baron and Cassesso engaged in a general conversation until Tameleo arrived (II. 151). After Baron said that he had come at Tameleo's request, Patriarca reasserted Tameleo's earlier statement to the effect that the police had approached him with a request to close down Marfeo's game, that his attempts to do so had been unsuccessful, and that Marfeo's continuation of the game and additional "police heat" had frightened bettors to a point where Patriarca's own gambling enterprise was suffering (II. 152–153). After Tameleo mentioned his own unsuccessful attempts to compel Marfeo to close down, Patriarca told Baron that he wanted Marfeo killed (II. 153–154).

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[1] References are to Volumes I–V of the record, all of which have been filed with the Clerk of this Court.

Although Patriarca said that he would reward them for their efforts, Baron and Cassesso said that they would execute the mission *gratis* (II. 155). At Baron's inquiry, Patriarca said that he wanted Marfeo killed immediately. Patriarca said that he planned to dress Baron and Cassesso as deliverymen in long white coats and scally caps and that they should drive a meat truck to one of Marfeo's "hangouts" where the murder would take place. After assuring Baron and Cassesso that he would have men in the area to take them away, and that he would supply all the equipment needed, Patriarca directed Tameleo to show them the various Marfeo "hangouts" (II. 155–156).

In compliance with Patriarca's direction, Tameleo showed Baron and Cassesso the numerous "hangouts" of Marfeo, which included various bars and restaurants in the Federal Hill area. He also showed them the location where Marfeo was operating the dice game (II. 157–160). Telling Baron and Cassesso that he had to meet some people who would assist in the Marfeo murder, Tameleo then left (II. 160). Baron and Cassesso returned to Boston (II. 160–163).

On the following day, Baron returned to Providence without Cassesso (II. 164). He met Tameleo at a local bar and said that he had returned to get a better picture of the Marfeo "hangouts" (II. 165). At this point, Tameleo told Baron that the police had learned of the argument between him (Tameleo) and Marfeo, and that Patriarca had decided to postpone the murder until the "police heat" had abated (II. 166). At his request, Baron was taken to Patriarca's office. Patriarca stated that he definitely wanted Marfeo killed,

but that it should be postponed for a while (II. 166, 167).

Approximately seven to ten days later, Tameleo met with Baron in Revere, Massachusetts. Tameleo said that the "contract" was still on, but that nothing had changed and that the killing should be further postponed (II. 167, 168).

Three days later, Baron and Cassesso returned to Providence. They were told by Patriarca that there were no new developments on the Marfeo "contract", and that they should let the matter "lie for a while" (II. 168). Tameleo again showed them the various Marfeo "hangouts" before they returned to Boston (II. 169–173).

Baron continued his trips to Providence until the fall of 1965 when he was arrested on an unrelated charge (II. 174).

2. Baron's testimony was corroborated in several aspects. Detective-Sergeant William Tocco, Corporal Joseph Broadmeadow, Detective-Trooper Edward Correia, all of the Rhode Island State Police, and Sergeant John Murrary, of the Providence Police Department, testified extensively as to the dice game being operated on Federal Hill by Marfeo (II. 35–60, 69–75, 76–81, 82–104). Detective Edward Walsh of the Boston Police Department testified that, during the pendency of the conspiracy, he had observed Baron and Cassesso together on approximately fifty occasions in the North End of Boston (III. 317). Lieutenant George Hurley of the Revere Police Department testified that, during the same period of time, he observed Tameleo between twenty and thirty

times at the Ebb Tide restaurant in the North End of Boston, and that on about four of these occasions Tameleo was with Baron (III. 342, 343). Detective-Captain John Eddy of the Providence Police Department testified that on March 4, 1965, he had told Patriarca that Marfeo's dice game had to be stopped (III. 333–335). Robert Yakubec, an undercover agent with the Treasury Department, testified extensively as to the gambling enterprise conducted by Tameleo in the Federal Hill area. He also testified that Tameleo's gambling activities subsided substantially after police activity increased in the area because of the continuance of Marfeo's dice game (III. 344–398).

3. Petitioners presented no evidence at trial. Their main defense was an attack upon the credibility of the government's chief witness, Joseph Baron (see Pet. 11–12). It was shown that Baron had spent approximately half his life in prison for various felonies and misdemeanors (II. 119–120, 258–263). He was an admitted "loan shark" (II. 120–121) whose business continued while he was in prison (II. 228–230).

It was shown that, after his incarceration in the fall of 1965 on the state firearms charge, Baron was concerned about other, still untried, charges filed against him (II. 189, 192, 193, 194), and intended to escape from prison (II. 217). He was first visited by agents of the F.B.I. on March 8, 1967. On April 13, 1967, Baron first related the essence of his trial testimony to the agents (III. 307–311).

It was shown that, when he decided to cooperate, F.B.I. agents promised that his wife and child would be granted protection, and that the fact of his cooperation would be brought to the attention of the District

Attorney of Suffolk County and to any presiding judge before whom state indictments would be tried (II. 200; III. 286–287, 310). It was also shown that the United States Attorney had promised that he would not be indicted by federal authorities if he testified before a federal grand jury (II. 184–185; III. 311), and that, although his state sentence for the firearms conviction had not been completely served, he had, since September 1967, been in the protective custody of United States Marshals and permitted to live with his wife in that custody (III. 281).

4. *a.* In closing argument, counsel for Tameleo said (V. 81–82):

> Is Mr. Baron just the ordinary bad guy turned informer? Is he just the stoolpigeon, so to speak that we often hear about in literature and in the movies and on television in connection with criminal trials? No. I say to you, Mr. Foreman and gentlemen, that Mr. Barboza is not a stoolpigeon. He is not an informer in the classic sense we talk about, because a stoolpigeon is someone who has changed his opinion about things that he did and is not telling the truth.
>
> I say to you that Mr. Barboza—Mr. Baron—is just a liar. *That his story is fiction, and that it was made up, cooly calculated, in that very cold blood that he admits that he has and for very good reasons.*
>
> What are the reasons that you should disbelieve Mr. Baron? The remarkable thing—and we will get to those reasons in just a moment, is that with that whole day and part of another day that Mr. Baron was on the stand

as I sat there I didn't get the impression that there was any reason for his testifying on behalf of the government in this case other than the three reasons that I am going to suggest to you now and they are the most powerful reasons, I think you are going to have to agree, the most tremendous inducements for anybody to lie. They are: sex, they are liberty, and they are money. Those are the three reasons that I am going to suggest to you that you ought not to believe Mr. Baron or that any twelve people who are going to give evidence of a fair shake must certainly have some reason to doubt what this man is testifying to about what he wants you to believe.

I don't think they necessarily have to be argued in any particular order, but let's try it this way: *inducement:* Mr. Baron's liberty. Now you have heard his Honor say that the United States Attorney has the privilege or right to say to a man that is going to testify in a conspiracy charge, "well we're not going to indict you."

Well, that is all very good to have a privilege or to have that right, but that certainly does not make the man any more truthful. As a matter of fact I suggest that it is a pretty darned good *inducement* for some of them to lie *and say anything that he might think someone wants them to say,* because what the heck he doesn't have to worry, he is not going to be indicted. He is not going to be punished.

* * * * *

He is not going to be found guilty of anything. [Emphasis added.]

Enlarging upon this theme, counsel for Tameleo continued:

> * * * on March 7, 1967 and on March 8, 1967 in came the Federal Bureau of Investigation agents. Mr. Baron didn't call them in. Do you believe he is telling the story because he is contrite or rehabilitated? He didn't call in the FBI. He didn't call any law enforcement officer in. He didn't say, "I have a story that is on my mind and it's been bothering me and I want to get it off my chest. I want now to be a good citizen." Nothing like that. *The FBI came in to see him on March 8th and what do we find even with regard to March 8th, no story the likes of which you have heard in this courtroom told the agents of the Federal Bureau of Investigation on March 8th, not a word on March 8th* (V. 83). [Emphasis added.]
>
> * * * * *
>
> He is not in solitary isolation any more, Mr. Foreman and gentlemen. He has his wife with him. Now, this man who is serving time in Walpole, and I recall his Honor saying and rightfully so, that every man should have his wife with him. Of course that is true, but are all the other inmates up at Walpole State Prison who are facing yea years in jail with their wives?
>
> What right does this man have to be with his wife, because he is *delivering* something? Is that the *consideration* for his being with his wife? (V. 86). [Emphasis added.]
>
> * * * * *

Before continuing the same line of attack, counsel for Patriarca gave his personal appraisal of Baron, stating (V. 103):

The man is not worthy of belief. When Mr. Balliro asked him did you come down from Providence with the intent to kill Marfeo and he looked at him in a cold stare and he said yes, and I have seen a lot of things and I have tried murder cases but it made me wince, and do a little shuddering.

Resuming the attack on Baron, and the government's case in general, counsel for Patriarca continued:

Now let me get back to show you the type of job that *they* are trying to do on my client Mr. Patriarca. The testimony is that Patriarca is in the coin vending machine office on Atwells Avenue in Providence, Rhode Island. The police came down here and testified they have been on the force for years and he arrives there in the morning and leaves in the afternoon or late afternoon.

He has never been seen in any bars, he has never been seen in any clubs. I think it is a fair inference from the evidence that Patriarca would go to his office during the day, leave at a certain hour and go to his home, as a decent man.

But let's see the reputation *they* are trying to *build up. They* don't bring any body in here to say on such a street in Providence there is a big game going, on Broadway or some other place over near Federal Hill, and that Raymond Patriarca is engaged in it. There are no State Troopers coming in here and testifying that Raymond Patriarca was found in a gambling operation with an apron on and passing out money. There is no such thing as that.

But this is all conjecture, and so forth, and I'm going to show you the *artfulness* of this

thing. *They* bring in Captain Eddy. His testimony doesn't mean much, and he is brought in for one purpose. He testified that he had a police officer, Murray or somebody else, go to Raymond's place of business, "Come down to the station".

And then when Raymond gets to the station there is a conversation and Captain Eddy tells him, "We're having a lot of trouble with Marfeo. You've got to do something about it."

Now stop and consider that. Why did *they* pick out Mr. Patriarca? Because he was friendly to Mr. Marfeo, would have influence with him, or because he has some influence on crime—and there is not too much crime in Providence, by the way.

So that *they* go to Raymond and *build him up* as an overlord, or something? That's what I am saying to you (V. 103–105). [Emphasis added.]

* * * * *

And as Mr. Chisholm well said, do you think this man is going to worry about committing a crime of perjury? This man who is now living with his wife, a fantastic arrangement? Why? Mr. Barbazo is not the type of man that comes in and tells this kind of a story without getting consideration for it and, the evidence was brought out yesterday that he is under the control of the United States Marshals and is having all the bliss of married life. That's quite some punishment, and he is supposed to be doing four to five years (V. 109).

b. Responding to the defense argument that Baron's trial testimony was fiction induced by the

government, the United States Attorney began his closing argument by saying (III. 497):

> At the outset, I would like to comment briefly upon defense counsels' arguments.
>
> Basically all of them say that Joseph Baron and Joseph Baron's testimony is not fact, it's fiction. If you accept that, you also accept the fact that that fiction was written, produced and directed by the United States Attorney's office, by the Federal Bureau of Investigation, by the police in Revere and the police in Boston——

On objection of defense counsel, the comment was ordered stricken (III. 497). The United States Attorney then dwelt upon the substantial testimony of six or seven other witnesses, including police officers and federal officers, which corroborated to some extent the testimony of Baron. As he concluded on that theme, the following took place (III. 516–517):

> Now isn't it strange that Tameleo should be taking him (Baron) to these places that I have just mentioned that Sergeant Tocco, Captain Eddy, Sergeant Murray and one or two other officers that I can't name, all identified as Marfeo hangouts? Is that fiction? Did all this testimony from these people who way back in 1965 probably never heard of Joe Baron, all of a sudden just begin to fit together when Joe Baron decides he is going to testify?
>
> I say that it is an insult to your intelligence, and I also say that if Joe Baron is guilty of making it fiction, then I am guilty of making it fiction, and the FBI is guilty of making it a fiction and every other witness who testified in this case is guilty of making up fiction.
>
> Mr. BALLIRO. I object.

The COURT. That may be argued.

At the conclusion of all arguments, the following colloquy took place (III. 521–523):

"Mr. BALLIRO. We move for a mistrial, based upon the grounds——

* * * * *

"Mr. BALLIRO. It has to do with the government attorney identifying himself with Mr. Baron to the extent that if this jury believes Mr. Baron and feels he is a liar they also must feel the attorneys for the government and the officers——

"The COURT. Strike that out.

"Mr. BALLIRO. It was left in the last time he argued it again.

"Mr. MARKHAM. I didn't say that.

"The COURT. What was that?

"Mr. BALLIRO. We don't believe that Mr. Markham is a fabricator or anything of that sort. I have known him for a long time and I consider that he is a friend. I think it is prejudicial argument and it sort of puts Mr. Markham in the role of——

"The COURT. It is trivial, Joe.

"Mr. BALLIRO. I think it is an effective argument.

"The COURT. I ruled it out at one time when he put himself in the picture. He did it again. Did you do it again?

"Mr. MARKHAM. No, Judge. I said if this is fiction, then every witness who appeared here is fiction.

"The COURT. You weren't a witness. Did you put yourself in there?

"Mr. MARKHAM. I asked a few leading questions on occasion, Judge.

"The COURT. You all commit that error, but you can't help that. All lawyers do it.

"The motion for mistrial, Mr. Balliro, is denied.

(Adjournment.)"

No request was made for special instructions regarding the alleged prejudicial remark. Prior to closing arguments (V. 70), and again in the general charge (III. 531), the trial court cautioned the jury that statements of counsel were not evidence, and that the case was to be decided on the facts proved at trial. The trial court also instructed that testimony of Baron "should be received with caution and scrutinized with great care" (III. 551).

c. On appeal, the court below held that the prosecutor's argument was proper, except that his reference to his own credibility was improper under its previously announced rule in *Greenberg* v. *United States,* 280 F. 2d 472 (C.A. 1). However, in view of the fact that the remark was ambiguous, that it was in part invited and provoked by defense counsel, and that defense counsel failed to bring the exact nature of the alleged error to the attention of the trial judge and to seek additional cautionary instructions,[2] the court could not find "any possibility of prejudice" (Pet. App. 14a) and the impropriety was, therefore, harmless within the meaning of Rule 52(b), F.R. Crim. P.

ARGUMENT

1. The court below properly held that, in context, the remarks of the prosecutor did not constitute

[2] The charge was not given until the following day.

reversible error. It is evident that the prosecutor did not intend to bring himself personally into the picture, and was not certain that he had done so on the occasion of the motion for a mistrial. To the extent that he did refer to his own credibility, the court of appeals correctly held that this ambiguous, passing reference did not, in context, cause "any possibility of prejudice" (Pet. App. 14a). That standard of review amply complies with an appellate court's responsibility in deciding that error was harmless. *Chapman* v. *California,* 386 U.S. 18.

In their principal thrust, the prosecutor's challenged remarks were a defense of the integrity of all the government witnesses against the unsupported charges of defense counsel. The remarks not stricken were made after the prosecutor had summarized the corroborating evidence given by witnesses who were government employees. Their purpose was to refute the aspersions cast by defense counsel on the character of the government as a whole.

On the facts of this case, the court below correctly held that these remarks of the prosecutor were justified. As set forth above, defense counsel went beyond the limits necessary for a proper attack upon the credibility of Baron and, in doing so, put the integrity of the government in issue. Not content to rest upon Baron's unsavory character and prior transgressions, counsel for Tameleo emphasized that his "fiction" was "induced" by certain promises made, assured, and carried out, by government officials, and that these "inducements" were very good instruments to make Baron "lie and say anything that he might

think someone wants them to say, because what the heck he doesn't have to worry, he is not going to be indicted. He is not going to be punished. * * * He is not going to be found guilty of anything" (V. 82). Whether intended or not, the import of the argument was that Baron's testimony was a "fiction" authored, not only by Baron, but by all the officials involved, including the witnesses and even the United States Attorney. Counsel for Patriarca continued this line of argument, even more explicitly. Alluding to what he alleged to be a calculated scheme to convict his client on no evidence, counsel cautioned the jury, "Now let me get back to show you the type of job *they* are trying to do on my client, Mr. Patriarca" (V. 103). (Emphasis added.) He asked the jury to "* * * see the reputation *they* are trying to *build up.*" (V. 104) (emphasis added), and to see "* * * the *artfulness* of this thing [the government's case]" (V. 104). He asked "Why did *they* pick out Mr. Patriarca?" (V. 104) (emphasis added), and finally argued that "* * * *they* go to Raymond and *build him up* as an overlord, or something" (V. 104–105). (Emphasis added.)

Petitioners are in no position to complain about the remarks which were invited and provoked by their own improper arguments. See *Lawn* v. *United States,* 355 U.S. 339, 359–360, n. 15; *Isaacs* v. *United States,* 301 F. 2d 706, 738 (C.A. 8), certiorari denied, 371 U.S. 818; *United States* v. *Kiamie,* 258 F. 2d 924, 934 (C.A. 2), certiorari denied, 358 U.S. 909; *Myres* v. *United States,* 174 F. 2d 329, 339 (C.A. 8), certiorari denied, 338 U.S. 849.

Moreover, the trial judge specifically instructed that comments of counsel were not evidence, and that Baron's testimony was to be received with caution and to be scrutinized with great care, all of which militated against possible prejudice.

2. On July 26, 1967, petitioners moved for a change of venue on the grounds of alleged prejudicial publicity (I. 4–5). Up to the time of argument on the motion on October 30, 1967, newspaper articles had identified Patriarca as head of the Cosa Nostra in New England, had referred to Baron's cooperation with the F.B.I., and had reported the present indictment and the fact that Marfeo had later been murdered.[3]

[3] On May 21, 1967, and again on May 23, two newspaper articles referred to Patriarca as the head of the Cosa Nostra in New England (IV. 1–2, 3). On May 25, and again on May 26, two newspaper articles reported that Baron had begun to cooperate with the F.B.I. (IV. 4, 5).

On June 20 and 21, various newspapers reported that petitioners had been indicted for the crimes proved herein. These articles reported the nature of the indictment, and the fact that Marfeo subsequently had been murdered. They also mentioned that Baron was a "key" to the case, and included a biography of Baron (IV. 7–10, 11, 12–14). On June 22, one newspaper reported that an arraignment would follow, that the United States Attorney hailed the indictment as a major step against organized crime, and that the indictment had been obtained as a result of the "singing" of Baron (IV. 15). Another reported Baron's biography (I. 16). On June 26, an article stated that Patriarca and Cassesso had entered pleas of not guilty at the arraignment. This article also mentioned that Patriarca reputedly was a leader of the Cosa Nostra (I. 17–18).

On July 20, 1967, one article reported that Baron was still cooperating with the F.B.I., and editorially extolled the value of an informer in the fight against organized crime (IV. 19).

On October 27, 1967, an article reported that Tameleo had been indicted by the State of Massachusetts for conspiring to murder one Edward "Teddy" Deegan (IV. 20).

On October 30, all petitioners substituted a motion for a continuance for the motion for change of venue (I. 6, 7, 8; V. 2–4). At that time, counsel for Patriarca recognized that the existence of the Cosa Nostra, and the fact that Patriarca was reputedly the head of the New England activities, were facts well known throughout the country. He indicated that Patriarca preferred to be tried in Massachusetts (V. 2–4). The case was subsequently set for February 6, 1968 (V. 58).

On January 30, 1968, a bombing attempt was made on the life of John E. Fitzgerald, Jr., an attorney representing Joseph Baron. On January 31, various newspapers in Boston and the nearby New England area reported the facts surrounding the bombing attempt. The newspapers speculated that the bombing was of a "gangland" nature, and reported that Fitzgerald represented Baron who had earlier testified in a state case involving a gangland murder (IV. 26–28, 29–31, 32–34, 35). One newspaper reported that Baron was scheduled to testify in a federal case (IV. 28), but neither the nature of the case nor the defendants were mentioned. On February 1 and 2, approximately seventeen articles contained further reports concerning the Fitzgerald bombing, and editorially demanded legislative and executive action. Although several mentioned that Baron had testified in the state case, none of the present petitioners was mentioned by name (IV. 36–58). In one newspaper it was reported that the United States Attorney would neither confirm nor deny speculation that Fitzgerald "was listed as a prospective witness in a racketeering prosecution

scheduled to begin shortly in a Federal Court here" (IV. 45). Neither the nature of the case nor the names of the defendants were mentioned in the article.

On February 2, 1968, petitioners moved for a further continuance because of publicity concerning the bombing attempt against Fitzgerald. On the basis of these motions, trial was set for March 4 (I. 14).

On February 20, 1968, petitioners again moved for a change of venue and a continuance on the ground of alleged prejudicial publicity.[4] Those motions, as

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[4] On February 3, one article mentioned that a local district attorney had been threatened in typical gangland fashion (IV. 59), and others demanded immediate legislative action (IV. 60, 64–65). Four articles also reported that Judge Ford had granted petitioners a continuance without comment. In these latter reports, it was mentioned that petitioners' moving affidavits in support of the motions for a continuance had cited the Fitzgerald bombing publicity as prejudicial to their case (IV. 59, 61, 62–63).

The publicity of February 4 and 5 focused upon medical and investigative progress reports on the Fitzgerald bombing, and organized crime in general (IV. 66–67, 73, 74–75, 76–77, 78, 79–80, 81, 82). One newspaper included a biography of Fitzgerald, and mentioned that petitioners had based their motion for a continuance on the publicity surrounding the attempt on his life since he was listed as a prospective witness in their case. The article went on to say, however, that the United States Attorney had serious doubts as to the importance of Fitzgerald as a witness (IV. 68–72).

Progress reports—medical and investigative—continued on February 6. Various other articles also mentioned that a reporter had received a gangland threat, that Cassesso and Tameleo had been arraigned in the Deegan murder case, and that a local criminal case—handled by Fitzgerald's law partner—had been continued (IV. 83–88, 90–91).

From February 7 through February 19, miscellaneous reports on the Fitzgerald bombing, and public reaction thereto, continued (IV. 89, 92–100). One report mentioned that a reporter

well as similar motions made on the first day of trial, were denied (I. 41–42; II. 214).

In a written memorandum denying the motions, Judge Ford said, *inter alia* (I. 41):

> The motions are based generally on articles appearing in press media concerning the Mafia and Cosa Nostra. They are not based on articles that have specific reference to any of the defendants.
>
> The motions request a transfer of the case to the Southern District of New York where, there and elsewhere in the United States, like articles concerning Cosa Nostra and the Mafia are constantly appearing as they are in the New England States.
>
> This case must be tried at some point and to delay this case or transfer it to a jurisdiction where such articles will cease to be published would result, in the judgment of this Court, that the case would never come to trial.

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had been threatened (IV. 92), and another—directed at the organized crime situation in Massachusetts—indicated that the United States Attorney had obtained a federal indictment against Patriarca (IV. 93).

On February 21, one article reported that petitioner had moved for a change of venue (IV. 101); on February 27, that the motions had been taken under advisement (IV. 102); and on February 28, that the motions had been denied (IV. 103, 104).

On March 1, one newspaper reported that the State Commissioner of Correction had sought legislative approval of a bill which would permit the transfer of state prisoners to federal institutions so as to afford protections to such prisoners as "Joseph Baron" (IV. 105). Another reported that the State Commissioner did not know the present whereabouts of Baron who was scheduled to be a witness at petitioner's trial (IV. 105).

On March 4, 1968, one newspaper heralded the beginning of petitioners' "much delayed" trial (IV. 106).

> Finally the climate with respect to the defendants' securing a fair and impartial trial is not adverse and is far more favorable than on October 30, 1967 when all defendants waived their motions for a change of venue.
>
> * * * * *

In the circumstances, the trial court properly denied the latter two motions for a change of venue and a continuance. Although petitioners have accumulated numerous newspaper items dating back to May 1967 which they claim to have been prejudicial, their argument in this Court is directed exclusively to the publicity surrounding the Fitzgerald bombing (Pet. 15–17). Contrary to petitioner's suggestion, however, that publicity was not prejudicial to the trial of their case. As emphasized by the court below, and as amply demonstrated by the exhibits introduced prior to trial, not one item of that publicity up to and including February 2, 1968—when petitioners moved for a continuance—suggested, or even hinted, that petitioners were connected with the bombing. Indeed, the inference attributable to that publicity was that certain local "gangland" defendants, against whom Baron had testified in a state criminal case, had been responsible for the attempt on Fitzgerald's life (see, *e.g.*, IV. 26–28, 29–31, 35, 37, 44, 48). The one item which reported that Baron was scheduled to testify in a federal case (IV. 28), and the other which speculated that Fitzgerald "was listed as a prospective witness in a racketeering prosecution" scheduled for the federal district court (IV. 45), were, for any but the most sophisticated reader, in-

nocuous, since neither the nature of the case (beyond its terse description as a "racketeering prosecution"), nor the names of the defendants therein, were identified. Nevertheless, the trial judge, in an abundance of caution, granted a continuance for one month (V. 65–68).

Thereafter—aside from the speculative publicity of February 3 and 4 engendered by petitioners' motion papers filed on February 2, 1968 (IV. 59, 61, 62–63, 68–72)—no publicity connected, or attempted to connect, petitioners with the Fitzgerald bombing. And as noted by the trial court and court below, publicity with respect to the bombing incident had completely abated by the time of trial.[5] In these circumstances, petitioners have failed to establish "as a demonstrable reality" that unfavorable publicity "create[d] such an atmosphere that it infected the jurors and deprived petitioner[s] of a fair trial on the evidence * * *" *United States ex rel. Darcy* v. *Handy,* 351 U.S. 454, 462, 463.[6]

[5] The jury was sequestered during the trial (Pet. App. 7a).

[6] Although petitioners briefly allude (Pet. 6) to publicity concerning electronic overhearings, there is no claim here concerning the overhearings themselves. Prior to trial, the Department of Justice turned over to the clerk of the district court all logs of electronic overhearings which related to petitioners. These logs, in turn, were inspected by counsel who represented petitioners at trial. No motions were made in the district court with regard to the logs.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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